No. 75-122

In the

# Supreme Court of the United States

OCTOBER TERM, 1975

LAWRENCE CANTOR d/b/a SELDEN DRUGS COMPANY, individually and on behalf of all other retail sellers of light bulbs similarly situated,

*Petitioner,*

*vs.*

THE DETROIT EDISON COMPANY, a New York corporation,

*Respondent.*

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

## REPLY BRIEF OF PETITIONER TO THE BRIEFS OF THE MICHIGAN UTILITIES GROUP AND THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AS AMICI CURIAE


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The issue which is presented to the Court is whether a public utility can obtain antitrust immunity for an activity referred to in its approved tariff in the absence of a legislative command or considered regulatory inquiry. Petitioner claims that under the doctrine of *Parker* v.

*Brown* the answer is no. The *amici curiae* claim that the answer is yes.

The position of the National Association of Regulatory Utility Commissioner's (hereinafter "NARUC"), is that in determining whether an anticompetitive activity is entitled to immunity "separate weight" must be given to the fact that the perpetrator is a "heavily regulated" company (NARUC brief, page 22). The Michigan Utilities Group goes further and suggests that private initiative in furtherance of or under color of a state regulatory scheme should be exempt from the antitrust laws. Both positions amount to an extension of antitrust immunity far beyond the limits of *Parker* v. *Brown* and *Goldfarb* v. *Virginia State Bar Association,* 421 U.S. 773 (1975).

To its credit, NARUC admits, by calling for a "special weight" to be given to the utility status of the defendant, that its suggestion is a departure from the holding in *Parker*. The Michigan Utilities Group, on the other hand, finds legitimacy for its proposition by misstating the holding in *Parker* v. *Brown*. Thus, in the first paragraph of its Summary of Argument the Michigan Utilities Group claims that *Parker*:

> ". . . held that the federal antitrust laws do not apply to conduct resulting from and subject to . . . regulation." (Michigan Utilities Group, brief page 5)

The antitrust exemption in *Parker* v. *Brown* does not rest, as the Michigan Utilities Group claims, on the principle that a state may substitute regulation for competition in a particular industry, nor does it rest upon the notion that an industry should not be subject to competing codes of regulation. However worthy these notions might be, in certain situations not applicable here, the antitrust holding in *Parker,* as confirmed by this Court in *Goldfarb,*



rests on the proposition that the antitrust laws do not apply to activities in which a state engages or which, acting as a sovereign, it commands. Moreover, it is unnecessary in the instant case to consider the notions of substituting regulation for competition or the purported evils of placing an innocent business under the whip of competing regulatory masters. The record here overwhelmingly demonstrates an absence of regulation or command by the State of Michigan over Respondent's light bulb program—an absence which neither *amici curiae* successfully rebut.[1]

Turning to the exact issue in this case, Petitioner suggests that, while there is no reason for departing from the basic *Parker-Goldfarb* test of "sovereign command"—

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[1]NARUC does not attempt a rebuttal. The Michigan Utilities Group in a footnote (b. p. 32, n.9), cites certain findings in Judge Feikens' opinion that the MPSC "required Detroit Edison to submit information 'on the direct cost of that plan'" in connection with the 1964 rate modification in which the bulb program was made optional for commercial customers. As Petitioner here pointed out in its brief to the Court of Appeals, Judge Feikens was apparently mistaken.

There is no evidence of any review or consideration by the MPSC given to Edison's 1964 request other than issuance of the order itself. Ronald Daniels, Edison's supervisor of the Rate and Revenue Requirement Department (Appendix 91a), testified on deposition that no cost data was submitted in connection with the 1964 request. (Appendix 111a) Judge Feikens, contrary to his own statement at the time of Oral Argument and apparently without regard for the admission by Daniels, found in his Memorandum Opinion that substantial cost data was filed in support of the 1964 rate change request. (Appendix 57a-58a) Regardless, even if such facts were submitted in connection with the 1964 tariff modification, that should not be the basis upon which this case should turn. Antitrust immunity should require continual regulation and review of Edison's changing program, not merely a one time review of part of its costs.

some special analytic tools might be useful in determining whether the exemption applies to a particular activity of a regulated utility. Thus, the Court can and should inquire first how pervasively regulated was the *particular activity* under attack and secondly, to what degree was the state involved in implementing and carrying out the program. Applying these tests to the facts in this case does not require either a careful weighing or the drawing of fine distinctions. It is clear that there is no shield from the antitrust laws under the *Parker* doctrine for Respondent's light bulb program.

Both *amici curiae* briefs suggest that Petitioner's claim is an attack upon the principle which this Court announced in *Nebbia* v. *New York,* 291 U.S. 502 (1934), and that Petitioner is attempting to cloak an attack on well settled Constitutional principles in the clothing of an antitrust action. As has been amply demonstrated, there is no state policy in Michigan with respect to light bulb distribution. There is certainly no statute dealing with light bulbs in Michigan. The absence of a similar program by any other private utility in Michigan, which was admitted by Respondent's Assistant Vice President in charge of customer services (Appendix 162a), is further proof, if any is needed, of the absence of a state policy and state concern with light bulb distribution.[2]

[2] Edison did not mention its light bulb program in its tariffs until 1916, seven years after Edison's electricity business became subject to regulation. NARUC was thus mistaken in its facts when it assumed that regulation of electricity and inclusion of the bulb program in Edison's tariffs were contemporaneous events. This is significant, for it further demonstrates the lack of interest of the State of Michigan in light bulbs as well as the fact that it was apparently Edison who decided to mention the program for the first time in its tariffs.



Accordingly, Petitioner has not and need not raise any Constitutional objections to the program of the kind that faced this Court in *Nebbia* v. *New York.* This becomes a *Nebbia* case only if the Court accepts the extreme position of the Respondent and the *amici curiae* that *any* activity of a regulated industry adopted pursuant to a general regulatory scheme would be exempt from the antitrust laws.[3]

There remains only one more argument common to both *amici curiae* briefs to which the Petitioner will address himself: the applicability of *Gordon* v. *New York Stock Exchange,* 422 U.S. 659 (1975) and *United States* v. *National Association of Security Dealers,* 422 U.S. 694 (1975). Both *amici curiae* briefs cite these cases for the

[3] While it is not an issue in the current case, it is interesting to speculate on what posture the federal courts and this Court might take had the State of Michigan or any state enacted a statute that restricts competition in the distribution of light bulbs or for that matter, phonograph record players or refrigerators. *Nebbia* is grounded on the proposition that:

> "that if the lawmaking body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests, produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend destruction of the industry itself, appropriate statutes passed in an honest effort to correct the consequences may not be set aside. . ." 291 U.S. @ 535.

It would seem that if a statute regulating light bulb distribution was not grounded in an honest effort to promote some public good, the federal courts would not be precluded under *Nebbia* from striking such legislation down either on Constitutional grounds or, using the supremacy clause, as being in conflict with the antitrust laws. Cf. *Schwegmann Bros.* v. *Calvert Distillers Corp.,* 341 U.S. 384 (1951).

proposition that antitrust immunity can be implied from broad regulatory statutes for privately initiated anticompetitive conduct. The application of these cases to the instant case is incorrect. In *Gordon*, the court permitted an exemption for fixed commission arrangements of the New York Stock Exchange on a record which showed a specific statutory provision, Section 19(b) of the Securities Exchange Act of 1934, which authorized the SEC to supervise the exchanges in the fixing of reasonable rates of commission, plus an extensive record of SEC activity in reviewing the practice under attack and substantial Congressional review of the SEC's supervision of the practice. In stark contrast, there is no legislative reference in Michigan to light bulbs, the MPSC has not exercised any continuing regulatory review of the program, nor has the Michigan legislature taken any action with respect to the MPSC's conduct in this matter analogous to that which Congress took in *Gordon*. The concurring opinions of Justices Douglas and Stewart are particularly illuminating here. Mr. Justice Douglas wrote to emphasize the single factor which for him was of prime importance:

> "The mere existence of a statutory power of review by the SEC over fixed commission rates cannot justify immunizing those rates from antitrust challenges. The antitrust laws are designed to safeguard a strong public interest in free and open competition and immunity from those laws should be properly implied only when some equivalent mechanism is functioning to protect the public interest. Only if the SEC is actively and aggressively exercising its power of review and approval can we be sure that fixed commission rates are being monitored in the manner which Congress intended. Cf. *Hughes Tool Co.* v. *Transworld Airlines, Inc.*, 409 U.S. 363, 387-389 (1973).



> "The Court reviews at length the history of the SEC's involvement with fixed commission rates. In light of that history, I am satisfied to join the opinion of the Court and affirm the judgment below." 422 U.S. at 691.

Similarly, Mr. Justice Stewart states:

> "The Court has never held and does not hold today that the antitrust laws are inapplicable to anticompetitive conduct simply because a federal agency has jurisdiction over the activities of one or more of the defendants. An implied repeal of the antitrust laws may be found only if there exists a "plain repugnancy between the antitrust laws and regulatory provisions". *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 351." 422 U.S. at 692.

Mr. Justice Stewart, citing *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357, viewed the question presented as whether the Exchange rules are "necessary to make the Securities Exchange Act work". Upon reviewing the legislative history of Section 19(b) and Congress' knowledge of exchange practices, he concluded that Congress considered fixed commissions to be in furtherance of that Act. 422 U.S. at 693. Here, Michigan's program of electric utility regulation works without the necessity for a light bulb program as evidenced by the stark fact that no other private utility in the State (or in the United States) has such a program. (Appendix 162a) Thus, the mere power to review or jurisdiction to regulate—which is the most that the Respondent and the *amici curiae* can demonstrate in the present case—is not enough of a basis to imply immunity.

The instant case lacks certain essential elements the Court found material in its 5 to 4 decision in *United States* v. *National Association of Security Dealers*, de-

cided the same day as *Gordon*. In NASD, the Appellant challenged the NASD's application of certain of its rules relating to dealer and broker operations in the secondary market for mutual fund shares. The Court noted that while the alleged violations were neither required by Section 22(d) relating to price of mutual fund shares nor authorized by Section 22(f), the conduct under attack was designed to suppress the same conduct which the SEC had consistently for thirty-five years restricted. The Court noted: "(T)his close relationship is fatal to the Government's complaint as the Commission's regulatory approval of the restrictive agreements challenged in Counts II-VIII cannot be reconciled with the Government's attack on the ancillary activities . . ." which it challenged. 422 U.S. at pp. 733-34. This close relationship between the activity attacked and activity which the SEC regulated in the exercise of considerable oversight was fundamental to the decision. Moreover, the Court noted that the SEC had repeatedly indicated that it weighed competitive concerns in the exercise of its continued supervisory responsibility (422 U.S. at p. 734) and that the history of the SEC's regulation of the industry "suggests no laxness in the exercise of its authority". 422 U.S. at 734. Finally, the Court, citing its decision in *Silver* v. *New York Stock Exchange,* found that the practice under attack was necessary to make the regulatory scheme work. 422 U.S. at p. 734. Thus, there is more than a difference in degree between the issues presented to the Court in the instant case and the issues which were presented in NASD. The differences are fundamental and the case therefore not controlling.

In sum, what the *amici curiae* are requesting (and what the Respondent impliedly seeks) is a new rule of law which would place state regulated utilities completely



outside the ambit of the federal antitrust laws. One might perhaps countenance such a result where the industry regulated *and the activity for which exemption was sought in particular* was under the close scrutiny of a federal regulatory agency specifically charged with responsibility for considering anti-competitive effects, and acting in pursuit of those responsibilities. To completely release the public utilities of this country from the antitrust laws and make their activities subject only to the vagaries of 50 different regulatory bodies and 50 different statutes as to anticompetitive effect seems, at the very least, ill advised.

Respectfully submitted,

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